

VZCZCXYZ0000
OO RUEHWEB

DE RUEHSJ #0745/01 2562349
ZNR UUUUU ZZH
O 122349Z SEP 08
FM AMEMBASSY SAN JOSE
TO RUEHC/SECSTATE WASHDC IMMEDIATE 0103
INFO RUEHZA/WHAG CENTRAL AMERICAN COLLECTIVE PRIORITY
RUEHDG/AMEMBASSY SANTO DOMINGO PRIORITY 1594
RHEHNSC/NSC WASHDC PRIORITY

UNCLAS SAN JOSE 000745

SENSITIVE
SIPDIS

DEPT FOR WHA, WHA/CEN, WHA/EPSC AND EEB; PLEASE PASS TO
USTR:AMALITO AND DOLIVER

E.O. 12958: N/A
TAGS: [CS](#) [ECON](#) [ETRD](#) [PGOV](#) [PINR](#) [PREL](#)
SUBJECT: SUPREME COURT RULING DELAYS CAFTA IMPLEMENTATION
PAST OCTOBER 1

REF: SAN JOSE 634 AND PREVIOUS

¶1. (SBU) SUMMARY: The Costa Rican Supreme Court has thrown up one more obstacle to CAFTA, ruling that one section of the final CAFTA implementation bill (on IPR and biodiversity issues) was unconstitutional. The Constitutional Chamber (Sala IV) held that the GOCR should have consulted with Costa Rica's indigenous communities, in compliance with the ILO Convention 169, about CAFTA-generated changes in the existing biodiversity law that could affect those communities. The Sala IV's action shocked the GOCR, pro-CAFTA legislators and the private sector. While a definitive prognosis awaits publication of the full Sala ruling (expected on September 16), VP Chinchilla told us September 12 that meeting the October 1 EIF deadline was now completely out of the question, even under the best case scenario. She said the GOCR will need another 1-3 months to correct and re-approve the IPR bill. Chinchilla and COMEX VM Pacheco did not ask us explicitly for an EIF extension (nor did we even hint at one), but they made clear that the GOCR was already laying the groundwork, and had received positive signals thus far from other CAFTA members. They also stressed that the Arias administration, its pro-CAFTA allies in the legislature and the private sector had been re-galvanized into action by the Sala ruling, and were determined to wrap up this law and all the pending technical issues as quickly as possible. COMEX Minister Ruiz is to call DUSTR Vereneau on September 15 to discuss the issue. END SUMMARY.

Sala Surprise Attack

¶2. (U) On September 11, the Sala IV (Constitutional Court) ruled 4-3 that one section of the final CAFTA implementation bill (on IPR and biodiversity issues) was unconstitutional. The majority opinion, written by Supreme Court President Luis Paulino Mora, held that the GOCR should have consulted with Costa Rica's indigenous communities, in compliance with the ILO Convention 169, about CAFTA-generated changes in the existing biodiversity law that could affect those communities. The Sala also ruled that proposed changes in the law had not been publicized adequately. Details on the Sala's decision are pending release of the full ruling, expected on September 16.

¶3. (U) NOTE: The relevant portion of Article 6 of the 1989 ILO convention, which is also known as the Indigenous and Tribal Peoples Convention, states that "governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is given to legislative or administrative measures which may affect them directly." This issue had not been raised in the Sala IV's majority opinions on other CAFTA legislation. END NOTE.

¶4. (SBU) The Sala IV's action shocked the GOCR, pro-CAFTA legislators and the private sector, and generated a series of emergency meetings convened by VP Laura Chinchilla (acting for President Arias who was still in Europe). In an evening press conference, a stunned-looking Chinchilla indicated that the GOCR respected the Court's decision, but now doubted that Costa Rica could implement CAFTA in time for the October 1 entry-into-force deadline. She added that she would "explore the possibility" of extending the deadline in a meeting with the Embassy on September 12. The press conference was followed by media releases on September 11 and 12 noting that the Sala's decision placed full implementation by October 1 in jeopardy, but underscoring the GOCR's determination to do all it could do to complete CAFTA as quickly as possible.

GOCR Will Not Make the Deadline

¶5. (SBU) Meeting with the DCM and Emboffs on September 12,

Chinchilla and COMEX Vice Minister Amparo Pacheco reiterated that they had no advance notice of the somewhat puzzling Sala IV decision. The good news: the Court had found only procedural problems, which were less difficult to correct. Court President Mora himself had assured Chinchilla that the correction process should be "manageable". The bad news: meeting the October 1 EIF deadline was now completely out of the question, even under the best case scenario. Chinchilla (who had been in contact with President Arias, COMEX Minister

Ruiz and the other senior officials traveling in Europe) predicted it would take "another 1-3 months" to address the problems identified by the Court.

¶6. (SBU) According to Chinchilla, in the best case scenario, the Sala would provide its full ruling to the legislature ASAP; she had asked the Court to do so by September 16. The Constitutional Consultation Committee would then take action, hopefully agreeing to strip out the problematic text and sending the modified bill for approval by a plenary vote. Given debate rules and the possibility of majority and minority reports issued by the committee, even this "fast" scenario could take a few weeks, and Chinchilla stressed that any changes to the law would have to be accepted by USTR as well. She added that the highly legalistic pro-CAFTA Libertarian Movement (ML) party could be as problematic in this scenario as the PAC-led opposition.

¶7. (SBU) In a worst case scenario, the law might have to be more extensively modified, which would take more time, and/or the opposition might press for another 30-day Sala IV review.

If indigenous consultations could not be handled in parallel (and separately from the CAFTA bill itself), then additional time would be required before the bill was complete. If comprehensive community-by-community consultations were required, the GOCR could find itself holding the equivalent of a "mini-referendum" on CAFTA with the indigenous people. The GOCR wanted to avoid this at all costs: such a lengthy delay could invite new attacks from the small, but still vocal, anti-CAFTA minority. Chinchilla and Pacheco seemed reasonably confident, however, that this "worse-worst" case option would not be needed, pending analysis of the Sala IV's full ruling.

Laying Groundwork for a Second Extension

¶8. (SBU) Chinchilla and Pacheco did not ask us explicitly for an EIF extension (nor did we even hint at one), but they made clear that the GOCR was already laying the groundwork. Minister Ruiz and the Costa Rican Embassy in Washington had begun informal consultations with the other CAFTA members. The signals about a later entry for Costa Rica were positive thus far, according to Pacheco. Echoing the earlier media releases, Chinchilla and Pacheco made clear that the Arias administration, its pro-CAFTA allies in the legislature and the private sector had been re-galvanized into action by the Sala ruling, and were determined to make the required corrections to this last law, plus resolve the pending technical issues on IPR, insurance and telecom, as quickly as possible. Chinchilla acknowledged that "everything" had to be completed before CAFTA could enter into force for Costa Rica. She added that Minister Ruiz would call DUSTR Vereneau on September 15 to discuss these issues further.

COMMENT

¶9. (SBU) This ruling was clearly a surprising blow to the GOCR, which as recently as September 10 had been laying out a (very optimistic) timetable to complete all legislation and regulations by September 23. But, there are some silver linings. The pro-CAFTA forces are energized and believe they can bring this to resolution. The GOCR is doing its own heavy lifting to prepare the other CAFTA partners to permit later EIF by Costa Rica. Under these circumstances, although they are not ideal, we recommend that President Arias be included in the September 24 AGP summit as planned. Being in a room full of counterparts who have long since completed their FTAs with the United States, and hearing a strong pro-trade message from POTUS can only help.

¶10. (SBU) Later, we (and the Arias administration, no doubt) will examine more closely why the Sala made this decision, and why President Mora (who acknowledged to the Ambassador recently the need to get CAFTA done) authored it. Interestingly, Sala IV President Ana Virginia Calzada, a biodiversity expert who had ruled (in the minority) against some of the earlier CAFTA bills, and who was judged most likely of all the magistrates to have voted no on this bill, ruled in favor this time. Finally, for those keeping score, the legislature approved one additional bill since our last report (Reftel), bringing the total approved to 12, with nine of those actually signed into law.